IN THE
Supreme Court of the United States

OCTOBER TERM 1987

(5)

No. 87-2123

DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
an agency of the State of Florida,
Petitioner,

v.

MID-FLORIDA GROWERS, INC. and
HIMROD & HIMROD CITRUS NURSERY,
Respondents.

RESPONDENTS' RESPONSE TO BRIEFS OF AMICI CURIAE IN SUPPORT OF PETITIONER

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RESPONDENTS' RESPONSE TO BRIEFS OF AMICI CURIAE IN SUPPORT OF PETITIONER

The Petitioner Department of Agriculture and Consumer Services, an agency of the State of Florida, has sought review of a decision of the Florida Supreme Court requiring payment for Florida's destruction of Respondent Nurserymen's healthy citrus trees. The Attorney General of Florida has filed an amicus brief seeking to buttress the arguments already made by the State of Florida. Various citrus growers have also filed an amicus brief suggesting, inter alia, that "if the State of Florida is forced to pay these claims, the Amici Curiae anticipate that the necessary revenues will be raised from the citrus industry, primarily the citrus growers. . . ." Motion for Leave to File Amicus Curiae Brief of Lykes Bros., et al., p. 4.

Neither amicus submission presents compelling arguments in favor of review. Indeed, both briefs help to demonstrate that the Florida Supreme Court's decision represents a fair application of Florida law to Florida's concern about citrus canker, negating any need for review by this Court.

A. The Amicus Brief of the "States"

The Attorney General of Florida writes that the decision below "nullifies this Court's decision in Miller v. Schoene, 276 U.S. 272 (1928)." Amicus Curiae Brief of Florida, et al., p. 2. The decision below belies that assertion. Miller v. Schoene was never mentioned by the Florida Supreme Court in reaching its conclusion that nursery owners must be compensated for the destruction of their healthy trees. The lone dissenter did not posit Miller v. Schoene as a reason for his disagreement. He believed "the evidence fails to support a claim for inverse condemnation" and cited only Florida cases to support his dissent. Petition Appendix A 7-8. We have already discussed Miller v. Schoene in Respondents' Brief in Opposition to Certiorari, pp. 19-20. The Florida Attorney General's repetition of the Miller argument previously made in the Florida Department of Agriculture and Consumer Services' certiorari petition adds little, except to illuminate the Florida focus of the decision below.

The Florida Attorney General's attempt to persuade by recounting alleged trial testimony regarding "scientific information," "scientific literature" and the trial court's "ignoring the testimony that the state had relied on scientific opinion" (Amicus Curiae Brief of Florida, et al., pp. 13-15) underscores the fact that Florida's quarrel is much more evidentiary that constitutional. Two Florida appellate courts have heard Florida's similar factual arguments. Both courts rejected them in favor of a Florida rule that the State should compensate the Respondents.[1] Petition Appendix, pp. A 1-9; A 10-16.

The Florida Attorney General concludes by saying that "[a] productive and healthy citrus industry is vital to Florida" and that by requiring compensation, the Florida Supreme Court has "[c]urtail[ed] the power of the state to

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1In point of fact, trial testimony established that the State was not implementing a carefully planned policy based on scientific study. The canker action plan in effect when symptoms appeared at Ward's Nursery contained no policy calling for any action in the situation here. The State developed the policy requiring destruction of Respondents' trees in an emergency meeting after the incident at Ward's and immediately implemented that policy against Respondents. An expert witness who was present at that meeting testified that action was not taken based on knowledge, but on panic.

fight disease" and "threaten[ed] the livelihood" of the state's citizens. Amicus Curiae Brief of Florida, et al., pp. 26-27. The Florida Supreme Court, and the Florida District Court of Appeal for the Second District, cognizant of the state's concerns, considered those arguments and rejected them in favor of the compensation which was required under the applicable Florida precedents.

The Attorney General of Florida has provided no principled basis for this Court to invoke certiorari jurisdiction.

B. The Amicus Brief of the Growers

The growers' interest in canker eradication, in preserving consumer acceptance and demand for Florida citrus, and in avoiding revenue enhancement measures to compensate persons injured by the canker eradication program (Motion for Leave to File Amicus Curiae Brief of Lykes Bros., et al., p. 4) are not the stuff of certiorari.[2]

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[2]The appearance of these growers as proposed Amici should not be taken as reflecting widespread industry support for the Petition. No statewide industry association, nor the Florida Citrus Commission,

The source of funds for compensating Respondents is a matter for the Florida legislature. The authority to conduct citrus canker programs is not at stake here. The growers' hyperbole that effective regulation is impaired is not supported by the record.[3]

The Florida Supreme Court decision poses no barrier to emergency state action in response to a perceived need. It simply concluded that on the facts of this case, compensation was required under Florida precedent:

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nor other large citrus producing states, nor even the USDA, has supported the Petition.

[3]Destruction of Respondents' healthy trees was wholly unnecessary to prevent disease or imminent danger. Respondents' budwood was removed from Ward's Nursery four months before any infection occurred there. If any of Respondents' trees had been diseased, trial testimony established that they would have shown symptoms within 6 to 15 days. But no symptom or disease, or even opportunity for disease, was present. The State took the most extreme measure against Respondents' nurseries, yet failed to take any action whatsoever as to the thousands of trees they had transferred to other premises, which trees (under the Department's logic) would also have been dangerous. In addition, the State subsequently abandoned entirely the policy of wholesale destruction in favor of simply removing any infected plants from the nursery. The Motion acknowledges that the impetus behind the Department's precipitous action was to protect the reputation of Florida citrus and maintain consumer acceptance and demand. Motion, p. 4.

> As the district court below correctly observed, "[w]hether regulatory action of a public body amounts to a taking must be determined from the facts of each case. . . . "The trial court's determination of liability in an inverse condemnation suit is presumed correct and its findings will not be disturbed on appeal if supported by competent, substantial evidence. . .
>
> A review of the record in this case reveals substantial competent evidence was presented at trial on which the trial court based its findings that the trees were healthy.
>
> Petition Appendix A 5.

Therefore the Court held the nursery owners must be compensated. That decision was not stayed. A subsequent trial was held in state court in which the Respondents obtained a compensation award solely under the mandates of the Florida Constitution. See Brief in Opposition to Certiorari, pp. 6-9.

Neither the decision below, nor the subsequent proceedings which awarded compensation pose a federal question, or a national concern, meriting review by this Court. The simple conclusion is that in Florida, if the State destroys healthy trees as part of its canker eradication program, it must pay for those trees. Therefore both the State's interest in preserving its citrus industry and its

interest in protecting the rights of its citizens under the State Constitution are served, and the Fifth Amendment is not implicated.

CONCLUSION

For these reasons, and the reasons advanced in the Brief in Opposition, this Court should deny certiorari.

Respectfully submitted,

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